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10
11 IN THE UNITED STATES BANKRUPTCY COURT

12 FOR THE DISTRICT OF OREGON

13 In re)

14 ROMAN CATHOLIC ARCHBISHOP)
15 OF PORTLAND IN OREGON, AND)
16 SUCCESSORS, A CORPORATION)
SOLE, dba the ARCHDIOCESE OF)
PORTLAND IN OREGON,)

17 Debtor.)

18 TORT CLAIMANTS COMMITTEE,)

19 Plaintiff,)

20 v.)

21 ROMAN CATHOLIC ARCHBISHOP)
22 OF PORTLAND IN OREGON, AND)
23 SUCCESSORS, A CORPORATION)
SOLE, dba the ARCHDIOCESE OF)
PORTLAND IN OREGON,)

24 Defendant.)
25)
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CLERK US BANKRUPTCY COURT
DISTRICT OF OREGON

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Case No. 04-37154-elp11

Adv. Proc. No. 04-03292-elp

**TORT CLAIMANTS COMMITTEE'S
RESPONSE TO CENTRAL
CATHOLIC HIGH SCHOOL
ALUMNI ASSOCIATION AND
CENTRAL CATHOLIC HIGH
SCHOOL PARENTS
ASSOCIATION'S
PRECAUTIONARY MOTION
REGARDING USE OF DONATIONS**

1 The Tort Claimants Committee (the "Committee") does not oppose the use of
2 donations raised by the Central Catholic High School Alumni Association and Central
3 Catholic High School Parents Association (the "Associations") to defend claims asserted in
4 this adversary proceeding. However, the Committee objects to the Associations' argument
5 that its motion should be granted because these funds ("Disputed Funds") are held in trust.
6 The Court should reject this rationale for two interrelated reasons. First, the Committee has
7 not had the opportunity to engage in the fact-intensive discovery that will be necessary to test
8 the validity of the Associations' claim. Whether Debtor's estate includes particular categories
9 of personal property, including funds held by Debtor's secondary schools, is a complex
10 question that should be the subject of a separate motion for summary judgment in this
11 adversary proceeding. Second, even if this motion were an appropriate vehicle for the
12 Court's resolution of the personal property issue, the Associations' argument would fail
13 because they have not come forward with clear and convincing evidence that the Disputed
14 Funds are held in trust.

15 While the Court could deny this motion, the Committee believes that payment
16 of the Associations' legal expenses from estate assets could be an appropriate exercise of
17 discretion under 11 U.S.C. §§ 105, 363(b) and 503. The Court should therefore grant this
18 motion, but not for the reasons advanced by movants.

19 **I. IT IS PREMATURE FOR THE COURT TO DETERMINE WHETHER**
20 **PERSONAL PROPERTY, INCLUDING THE FUNDS AT ISSUE HERE, ARE**
21 **PROPERTY OF THE ESTATE**

22 The Associations argue that they are entitled to use the Disputed Funds to pay
23 their legal expenses because these funds are not property of Debtor's estate, but instead are
24 held in charitable trust for the educational mission of Central Catholic High School.

25 Determining whether a trust exists can be difficult when a court is faced with
26 a single donation. In this case, Debtor and its co-defendants' trust arguments may require the
Court to determine the trust status of donations stretching back over 100 years in the course

1 of deciding whether these assets are property of the estate. The Committee will not be able
2 to respond fully to any of the defendants' trust arguments concerning donations until it
3 engages in extensive discovery. Before the parties can begin this process, the Court will
4 need to develop a discovery protocol that will apply to all funds Debtor claims to hold in
5 trust for its parishes, schools and other parties. The Court and parties will use their resources
6 most efficiently if they address these procedural issues in the context of a separate motion for
7 summary judgment that focuses on personal property—and not in the context of a
8 "precautionary motion" concerning the payment of legal fees. This is particularly so because,
9 for the reasons provided below, there is no need for the Court to resolve these issues in order
10 to assure the due payment of the Associations' legal expenses.

11 **II. THE ASSOCIATIONS HAVE NOT SHOWN THAT THE DONATED FUNDS**
12 **ARE SUBJECT TO A TRUST**

13 Even if it were necessary for the Court to resolve the Associations' trust law
14 argument, it would fail. Under Oregon law, a party seeking to prove the existence of a trust
15 must come forward with evidence that is "clear, unequivocal and convincing." *Shipe v.*
16 *Hillman*, 296 Or. 556, 564 (1955). The Associations have not offered such evidence.

17 The Oregon Supreme Court has held that a party seeking to prove a trust must
18 offer more than "[t]he bare assertion by a third person that the grantor's purpose in making a
19 conveyance was to create a trust" *Trustees of the Presbytery of the Willamette v.*
20 *Hammer*, 235 Or. 564, 567 (1963). However, the Associations offer nothing but the
21 declaration of Peter Corrado, Director of the Central Catholic Office of Alumni and Planned
22 Giving and the Central Catholic High School Alumni Association. While Mr. Corrado
23 describes the Associations' recent fundraising efforts in general terms, neither he nor the
24 Associations have come forward with any documentation for these activities that would assist
25 the Court in determining whether the funds are held in trust. It is unclear whether the
26 Associations (or the Central Catholic High School Development Office) maintain bank

1 accounts. If there are such accounts, the Associations have not revealed the names of the
2 signatories on these accounts. The Associations have also declined to offer evidence
3 concerning their decision-making processes or relationship to Debtor.¹

4 The Associations have also failed to come forward with evidence on the issue
5 that is the touchstone of the law governing the creation of a trust: whether donors have
6 manifested an intention to impose fiduciary duties on the recipients of their funds. *See*
7 Restatement of Trusts (Second) §§ 348 & 351 cmt. c ("A charitable trust is not created unless
8 the settlor manifests an intention to impose enforceable duties."). The motion is not
9 supported by a single affidavit from a donor, or the correspondence between a donor and the
10 Associations.

11 **III. GRANTING THIS MOTION COULD BE AN APPROPRIATE EXERCISE OF**
12 **THE COURT'S DISCRETION TO AUTHORIZE ADMINISTRATIVE**
EXPENSES

13 Although there is no reason why the Court must grant this motion, the
14 Committee nevertheless believes that the Court could approve use of the funds at issue to pay
15 the Associations' fees. The Court has authority to grant this motion under a number of
16 Bankruptcy Code provisions. Section 363(b) authorizes the use of estate property outside the
17 ordinary course of business after notice and a hearing. Section 503(b) permits the court to
18 allow administrative expenses that benefit the estate, including legal fees. Finally, the Court
19 has equitable power under Section 105(a) to issue "any order, process, or judgment that is
20 necessary or appropriate" to carry out the provisions of the Bankruptcy Code.

21 Payment of the Associations' legal expenses from the estate could be a
22 prudent investment in the efficient administration and resolution of this case. The

23 ¹ Mr. Corrado is presumably an employee of Debtor, because Debtor has successfully
24 maintained in prior litigation that Central Catholic's staff are Archdiocesan employees. *See*
25 *Central Catholic Education Ass'n v. Archdiocese of Portland*, Case No. PR-1-93 (Or. E.R.B.
26 Sept. 14, 1993), *aff'd* 323 Or. 238 (1996) (attached as Exhibit 12 to the Declaration of
Timothy J. Conway in Support of the Tort Claimants Committee's Second Motion for Partial
Summary Judgment).

1 Associations represent interests that are directly affected by the adversary proceeding. Their
2 counsel can help counsel for Debtor and the Parishioners' Committee advance the trust law
3 arguments that will figure in the adversary proceeding. To the extent that donation-by-
4 donation discovery proves necessary, the Associations are in a good position to marshal this
5 evidence because fundraising records are maintained at the school level. Finally, as the
6 Parishioners' Committee noted in its own "Precautionary Motion," the full involvement of all
7 defendants will help guarantee the validity of the Court's decisions in the adversary
8 proceeding.

9 **IV. CONCLUSION**

10 The Court should grant the Associations' motion, but not for the reasons they
11 have articulated. While the parties have not proven the existence of a charitable trust that is
12 immune from the claims of Debtor's tort creditors, payment of the Associations' legal
13 expenses could be a prudent expenditure of estate assets that would encourage the most
14 comprehensive resolution of these proceedings at the earliest possible date.

15 DATED this 3rd day of June, 2005.

16 TONKON TORP LLP

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18 By 
19 ALBERT N. KENNEDY, OSB No. 82142
20 Attorneys for Tort Claimants Committee

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **TORT CLAIMANTS COMMITTEE'S RESPONSE TO CENTRAL CATHOLIC HIGH SCHOOL ALUMNI ASSOCIATION AND CENTRAL CATHOLIC HIGH SCHOOL PARENTS ASSOCIATION'S PRECAUTIONARY MOTION REGARDING USE OF DONATIONS** on:

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6 address on the date set forth below.

7 DATED this 3rd day of June, 2005.

8 TONKON TORP LLP

9
10 By 
11 ALBERT N. KENNEDY, OSB No. 82142
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